

3-9-2015

# State v. Lemmons Appellant's Reply Brief Dckt. 42823

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,

Plaintiff-Appellant-  
Cross Respondent,

vs.

BRYANN KRISTINE LEMMONS,

Defendant-Respondent-  
Cross Appellant.

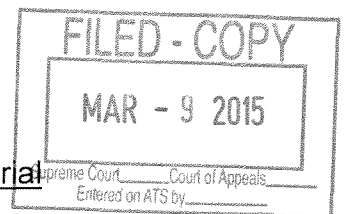
NO. 42823

TWIN FALLS CO. CASE NOS.  
CR-2011-14836, CR-2012-10131

APPELLANT-CROSS RESPONDENT'S  
REPLY BRIEF ON REVIEW

ARGUMENT

Lemmons Is Entitled To Neither An Acquittal Nor A New Trial



A. Introduction

Lemmons contends on review that double jeopardy prevents this Court from addressing the district court's post-verdict acquittal; that the district court erred in its jury instructions; and that the prosecutor erred in his closing arguments. (Respondent/Cross-Appellant's Brief on Review, pp. 8-10, 14-17, 21-29 (hereinafter "Response brief").) These arguments are the same, often verbatim, as the arguments

Lemmons has already presented in briefing. (Compare Respondent/Cross-Appellant's Brief on Appeal.) Those arguments were addressed in the state's reply brief incorporated by reference as the State's response on review. Lemmons makes two new arguments, however: (1) that the district court's post-trial acquittal "relates back" to the trial court's mid-trial denial of a motion to acquit, thus rendering the jury's verdict a violation of her double jeopardy rights (Response brief, pp. 10-13) and (2) that the district court did not err by denying the state's request it take judicial notice that an ounce is more than 28 grams (Response brief, pp. 18-21). The first argument fails because it is devoid of legal merit. The second argument is irrelevant.

B. Lemmons' Argument That The District Court's Post-Verdict Acquittal "Relates Back" Is Meritless

The Double Jeopardy Clause "does not preclude a prosecution appeal to reinstate the jury verdict of guilty." Smith v. Massachusetts, 543 U.S. 462, 467 (2005). This is so because double jeopardy protections prevent "postacquittal factfinding proceedings going to guilt or innocence," which are unnecessary if a verdict is reinstated. Id.<sup>1</sup> "[A] defendant has no legitimate claim to benefit from an error of law when that error could be corrected without subjecting him to a second trial before a second trier of fact." United State v. Wilson, 420 U.S. 332, 345 (1975). Because the state in this case seeks to reinstate the jury verdict, and not postacquittal factfinding proceedings, double jeopardy is not implicated.

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<sup>1</sup> Of course a defendant may waive his right against being re-tried and seek a new trial as a remedy for trial error. United States v. Wilson, 420 U.S. 332, 343 fn.11 (1975) (a defendant seeking relief from error is an exception to the "one trial" rule generally imposed by the Double Jeopardy Clause).

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Lemmons contends that the court's post-verdict acquittal "relates back" and is actually a pre-verdict acquittal because the motion for acquittal was initially made during the trial. (Response brief, p. 13.) This argument fails because it is unsupported by any law. State v. Zichko, 129 Idaho 259, 263, 923 P.2d 966, 970 (1996) (a party waives an issue on appeal if either authority or argument is lacking). Moreover this argument has been disavowed by the Supreme Court of the United States in authority Lemmons herself cites for other purposes. In Evans v. Michigan, \_\_\_ U.S. \_\_\_, 133 S.Ct. 1069 (2013) (cited Response brief, p. 20), the Court rejected the argument that preventing appellate review of erroneous pre-verdict grants of acquittal is overly onerous in part by pointing out that "[m]any jurisdictions, including [Idaho, see I.C.R. 29(b)], allow or encourage their courts to defer consideration of a motion to acquit until after the jury returns a verdict, *which mitigates double jeopardy concerns.*" Id. at 1081 (emphasis added). Lemmons' proposed "relation back" theory is directly contrary to established precedent of the Supreme Court of the United States.

The state is not seeking postacquittal factfinding proceedings and no double jeopardy violation arose from allowing the trial to proceed to a jury verdict after the initial denial of the motion to acquit. Lemmons' contention that the post-verdict acquittal granted by the trial court is actually a pre-verdict acquittal which prevents this Court from reinstating the jury's guilty verdict is specious.

C. Lemmons' Argument That The District Court Did Not Err By Declining The Prosecution's Request For Judicial Notice Is Irrelevant

Lemmons also adds an argument on review that the district court did not err by declining to take judicial notice that an ounce is 28.35 grams. (Response brief, pp. 18-

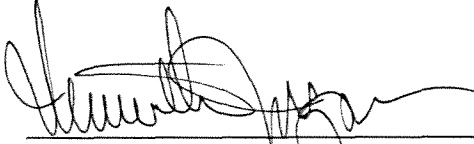
21.) Because the state has never presented this as an issue in this case (Appellant's brief, p. 3), this argument is irrelevant. The district court did take notice in post-trial motions that it is a "mathematical scientific fact" that an ounce equals 28.35 grams. (Trial Tr., p. 485, Ls. 3-8.) Furthermore, that an ounce equals 28.35 grams cannot be reasonably or seriously disputed.

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#### CONCLUSION

The state respectfully requests this Court to reverse the district court's post-trial order of acquittal and reinstate the jury's verdict.


DATED this 9th day of March, 2015.

  
Kenneth K. Jorgensen  
Deputy Attorney General

#### CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 9th day of March, 2015 I caused two true and correct copies of the foregoing APPELLANT-CROSS RESPONDENT'S REPLY BRIEF ON REVIEW to be placed in the United States mail, postage prepaid, addressed to:

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